

Decision 05-04-007 April 7, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SAN DIEGO GAS & ELECTRIC COMPANY for Authority Pursuant to Public Utilities Code Section 851 to Sell Certain Property in Its Transmission Corridor in the City of San Juan Capistrano in the County of Orange to Whispering Hills, LLC, to Realign Transmission and Distribution Lines Overhead on a Temporary Basis and Underground on a Permanent Basis and to Enter into Easements with Whispering Hills, LLC. (U 902-E)

Application 04-07-049
(Filed July 30, 2004)

**INTERIM OPINION ALLOWING GRADING AND ORDERING
SAN DIEGO GAS & ELECTRIC COMPANY
TO ENTER FURTHER NEGOTIATIONS**

I. Summary

This decision allows Whispering Hills, LLC (Whispering Hills) to perform grading on the property that is the subject of this application, and directs San Diego Gas & Electric Company (SDG&E) to enter into further negotiations with Whispering Hills regarding the price to be paid for the property.

II. Background

SDG&E submitted an application to this Commission under Pub. Util. Code § 851, seeking permission to sell property in a transmission corridor in the City of San Juan Capistrano. The prospective buyer is Whispering Hills, a developer that is building Whispering Hills Estates, a gated planned community of 155 single-family homes and a high school site. SDG&E owns a transmission

corridor and transmission lines in the area of the planned development. The plan is for SDG&E to temporarily relocate its transmission lines, the developer would then grade and prepare a street in the general area of the current transmission lines, and the transmission lines would then be permanently relocated underground in the street.¹ In its application, SDG&E proposes to sell its transmission corridor in the areas of the development to Whispering Hills, and to retain an easement for its utility facilities.

SDG&E's application, as filed, had two significant omissions. First, SDG&E did not include the Environmental Impact Report (EIR) prepared on the development project by the City of San Juan Capistrano. SDG&E mistakenly asserted that the EIR had been superseded by an Addendum to the EIR prepared by the Capistrano Unified School District. (See, Application, p. 10, fn. 6.)² Second, SDG&E did not serve its application on anyone other than itself and Whispering Hills.

The assigned Administrative Law Judge (ALJ) issued a ruling requesting SDG&E provide the additional information needed for the Commission to review the application, and to more broadly serve the application.³ SDG&E

¹ SDG&E requested Commission approval of the temporary and permanent relocation of the lines in Advice Letter 1566-E, filed February 17, 2004, and approved on April 1, 2004.

² The application was also unclear whether SDG&E believed that Commission approval of the project was exempt from review under the California Environmental Quality Act (CEQA), or whether SDG&E believed that the Commission was to act as a responsible agency under CEQA.

³ Administrative Law Judge's Ruling Requesting Additional Information and Service, dated October 14, 2004. The Ruling also identified potential problems with the process

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subsequently provided the requested information and served its application on a broader service list. (See, Response of SDG&E to ALJ's Ruling Requesting Additional Information and Service, dated October 22, 2004.)

In response to the broader service required by the ALJ's Ruling, the Commission received four letters. Three of the letters were from individuals living in the area of the property that SDG&E proposed to sell, and raised issues regarding the value of the property.⁴ The fourth letter was from the Capistrano Unified School District, and expressed general support for SDG&E's application. The three letters from residents argued that the proposed sale price for the property was significantly too low. In order for the Commission to address and resolve the large discrepancy in the land values claimed by SDG&E and the letters from the local residents, the ALJ allowed SDG&E and the other parties an opportunity to respond to the allegations raised in the letters via comments.

Comments relating to the sale price of the property were received from SDG&E, Whispering Hills, the Commission's Office of Ratepayer Advocates (ORA), and local residents Anne Fox, Mark Nielsen, and Mike Mathewson. Because several parties (SDG&E, ORA, and Mr. Nielsen) expressed a desire to submit further information to the Commission, the ALJ allowed for a second round of comments. Reply comments were received from SDG&E, Whispering Hills, ORA, Mr. Nielsen, and Ms. Fox. Subsequently, SDG&E sought and was granted leave to submit a response to ORA's reply comments.

used by SDG&E in preparing and submitting its application, and required SDG&E to maintain certain records relating to the application.

⁴ These three letters were from Anne Fox, Mike Mathewson, and Susan Palazzo.

III. The Value of the Property

The property that SDG&E proposes to sell is a 150-foot-wide transmission corridor, totaling approximately 14 acres. In its application, SDG&E provided an appraisal of the property. While the appraisal was performed in 2001, and was prepared for Whispering Hills, rather than SDG&E, there were no readily apparent flaws with the appraisal. However, the initial letters from the local residents pointed out two potential problems with the appraisal, resulting in the appraisal being far too low, according to the residents.

First, the residents pointed out that appraisal assumed that the land was zoned “Growth Management,” rather than its actual current zoning of “Planned Community.” Planned Community is a significantly less restrictive zoning than Growth Management, and allows for much greater development density. Second, the residents argued that the appraisal did not consider the most recent comparable land sale in the area, which is the sale of land to the local high school. According to the letters, the value of land reflected by that sale is approximately \$1 million per acre, implying that the property SDG&E proposes to sell could be worth approximately \$14 million, rather than the \$100,000 that SDG&E argues is the fair market value of the property.

SDG&E and Whispering Hills responded to these claims, and argued that Whispering Hills would obtain only a minimal net gain of unencumbered property, for while SDG&E was proposing to sell 13.8 acres of land, SDG&E would receive 13.5 acres of easements in return.⁵ In other words, Whispering

⁵ Because the transmission line will not be relocated in exactly the same alignment, the 13.5 acres of easement consists of 6 acres reserved over the transferred property, and a new easement of 7.5 acres over land already belonging to Whispering Hills. These

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Hills is not really getting 14 acres of developable land, but only highly encumbered property.

Whispering Hills argues that there are other encumbrances that reduce the value of the property, and that the various encumbrances render the change in zoning largely irrelevant. Whispering Hills also pointed out that it has spent (and will spend) considerable sums of money in grading, site preparation, development applications, and environmental mitigation for the property in the area, including the site of the high school. This argument has two implications—first, the price of the land sold to the high school was for significantly improved land, and accordingly it is not really comparable to the land at issue here, which has not received the same improvements; and second, to the extent that encumbrances have been reduced or removed from the property at issue, Whispering Hills has paid the cost of minimizing or eliminating those encumbrances.⁶ Finally, SDG&E states that it required a 21% increase in the purchase price from that reflected in the appraisal to account for any increase in value occurring since the date of the appraisal.

However, in his comments, local resident Mathewson submitted documentation that Whispering Hills has entered into an agreement to resell 0.95 acres of the land that it will acquire from SDG&E for a price of \$965,000. Whispering Hills responded to Mr. Mathewson, and notes that: “The 0.95 acre parcel is part of the high school site, improved consistently with the rest of that

numbers are from SDG&E’s pleadings; the numbers cited by Whispering Hills are somewhat different.

⁶ In other words, to the extent that the value of the land is now higher, Whispering Hills itself is responsible for that higher value because of its expenditures.

property.”⁷ (Reply Comments of Whispering Hills, p. 3.) According to Whispering Hills, for the high school site Whispering Hills is spending “[O]ver \$62 million to grade the project area and to provide necessary infrastructure and access, and some \$10 million more for entitlement and mitigation purposes.” (Id.)

Nevertheless, based on the record before us, we cannot say that \$100,000 is a reasonable price for the property that SDG&E proposes to sell. The information presented by the local residents casts significant doubt upon the adequacy of that price. While we understand the counterbalancing factors presented by SDG&E and Whispering Hills, we do not find them adequately persuasive to completely rebut the argument of the local residents that the proposed sale price is inadequate.

Rather than attempting to set a price based on the conflicting information before us, we direct SDG&E to enter into further negotiations with Whispering Hills regarding the price to be paid for the property. In its negotiations, SDG&E (and Whispering Hills) should take into consideration the information provided by the local residents regarding the potential value of the property. We expect the result of these further negotiations to be that SDG&E will receive a higher price for the property at issue. To provide the proper safeguards and incentives for the negotiations, in any sale of the property at issue, ratepayers will receive at least the \$100,000 originally recommended by

⁷ Absent evidence to the contrary, we will give SDG&E and Whispering Hills the benefit of the doubt, and assume that the 0.95 acre will be developed in the future. If the 0.95 acre of land still belonging to SDG&E has already been developed, SDG&E and Whispering Hills would have acted without authority, and inconsistently with the October 14, 2004 ALJ Ruling in this proceeding.

SDG&E, and any incremental amount received for the property as a result of further negotiations will be shared equally by ratepayers and SDG&E.

IV. Grading

In its application, SDG&E requested permission to allow Whispering Hills to perform grading on the property, pending Commission approval of the sale of the property. (See, Application, pp. 2, 6.) Specifically, SDG&E asks for permission to allow Whispering Hills to grade: “[O]n that portion of SDG&E’s property from which the Power Lines have been removed and relocated, pending Commission approval of the Application.” (*Id.*, p. 2.) According to SDG&E, allowing Whispering Hills to grade the property will save time and money on the project, and because the transmission lines have already been temporarily relocated, the grading will not adversely affect SDG&E’s ability to provide safe and reliable service. (*Id.*, pp. DAW-3 and 4.)

We grant SDG&E’s request that it be authorized to allow Whispering Hills to perform grading on the specified portion of SDG&E’s property. This is consistent with our previous approval of SDG&E’s advice letter 1566-E, which requested approval for the temporary and permanent relocation of the electric transmission lines, including their undergrounding. No permanent non-utility structures, however, may be constructed on the property at issue unless and until this application is granted authorizing the sale of the property.

V. CEQA

The larger Whispering Hills Estates development has been subject to review under CEQA. The City of San Juan Capistrano prepared an EIR, and the Capistrano Unified School District prepared two Addendums to the City’s EIR. (State Clearinghouse No. 1998-031150.) This Commission’s role accordingly is that of a responsible agency under CEQA. In that role, the Commission has

reviewed and considered the information in the EIR prepared by the City of San Juan Capistrano and the Addendums prepared by the Capistrano Unified School District. (See, CEQA Guideline 15050(b).)

Because our approval is limited to the grading of specific property, the grading is the “project” for which we must perform a CEQA review. (See, CEQA Guideline 15378(c).) As a responsible agency, we must consider the environmental effects of the grading as shown in EIR and Addendums, and make the appropriate findings. (CEQA Guidelines 15096(f) and 15096(h).)

The EIR and Addendums do not separately analyze the environmental impacts of the grading that we are approving today from the more widespread grading required by the larger development project. We base our findings upon the EIR and Addendums, as required by CEQA, and we look to their analysis of the environmental impacts of grading. Accordingly, to the extent there is any error in our analysis, we may be overestimating, rather than underestimating, the environmental impacts of the grading that we approve today.

The EIR identifies potentially significant environmental effects relating to grading activities in the areas of Land Use and Planning, Geology and Soils, Hydrology and Water Quality, Air Quality (short term), Biological Resources, Utilities, Aesthetics, Cultural Resources. For the project ultimately approved, however, the EIR finds that all of these impacts can be reduced to less-than-significant levels with the implementation of mitigation measures. (EIR, pp. 5-34.) The EIR sets forth specific mitigation measures for each of these potential impacts, and repeatedly makes the finding that: “Changes or alternations have been required in, or incorporated into, the project which avoid or substantially lessen many of the significant environmental effects as identified in the EIR.” (*Id.*)

The original Addendum finds that the environmental effects in the area of Biological Resources will actually be less than identified in the EIR, but in all other relevant respects, this Addendum makes no substantial change from the EIR's previous analysis. The scope of the second Addendum is limited to reviewing the impact of the temporary relocation of SDG&E's transmission lines, which was not previously reviewed, as the EIR only reviewed the permanent relocation. The second Addendum finds that there is no substantial change from the EIR's previous analysis.

Mitigation measures adopted related to grading activities include: implementation of design techniques to protect ridgelines such as blending contours and use of variable gradients (Aesthetics and Land Use & Planning); incorporation of recommendations from the Preliminary Geotechnical Investigation (Geology); maintenance of historical peak flows by the use of detention basins or other structures, approval of a Water Quality Management Plan and Storm Water Pollution Protection Plan (Hydrology); compliance with fugitive dust and wind control measures consistent with the South Coast Air Quality Management District Rule 403 (Air Quality); re-vegetation, site restoration, weed control, preconstruction surveys and compensation for loss of certain habitat (Biology); ensurance of access easements (Utilities); and on-site paleontologist and archaeologist to ensure proper exploration and salvage of any discovered resources (Cultural).

Based upon our review of the EIR and Addendums, and the mitigation measures required by those documents, we find that reasonable and feasible mitigation measures were adopted to avoid or reduce any potentially significant environmental impacts from grading to less-than-significant levels. Accordingly we find that the grading we approve today has no significant environmental

impact and we adopt the applicable grading mitigation measures for purposes of our approval.

VI. Further Proceedings

Upon completion of its further negotiations with Whispering Hills, SDG&E shall file and serve a motion, requesting leave to modify its application to reflect the results of the negotiations. To the extent that other parties wish to comment on those results, they may file and serve responses to SDG&E's Motion, consistent with Rule 45 of the Commission's Rules of Practice and Procedure (Rules). If SDG&E's Motion is granted, this Commission will then proceed to consider the sale of the property as proposed in the application.⁸ At the time that the Commission considers the sale of the land, the Commission will perform the CEQA review appropriate to that project, again in the role of responsible agency.

VII. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Peter V. Allen is the assigned ALJ in this proceeding.

VIII. Comments on Draft Decision

The draft decision of the ALJ was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7. Comments were received from SDG&E, Whispering Hills, and ORA.

In its comments, SDG&E points out an inconsistency between the text of the decision and Ordering Paragraph 3, and suggests that Ordering Paragraph 3

⁸ The Commission will also consider the procedural issues discussed in the ALJ Ruling of October 14, 2004.

be corrected. (SDG&E Comments, p. 11.) We have corrected Ordering Paragraph 3 to properly refer to “non-utility structures.”

SDG&E also requests that the decision expressly limit its scope to the specific facts of this case. (SDG&E Comments, p. 10.) Given the (hopefully) unique facts surrounding this transaction, and the fact that the Commission is not generally bound by its own precedent, it is not clear exactly what SDG&E is concerned about. Nevertheless, we will note that this decision is based on the facts currently before the Commission, and this decision in no way limits the ability of the Commission to issue any future orders it deems appropriate.

Unfortunately, the remainder of SDG&E’s comments consist of ad hominem attacks on the local residents that intervened in the case, and mischaracterizations of the law, the record, and the draft decision.

SDG&E’s central claim is that: “The Draft Decision commits legal error by ignoring the substantial evidence adduced herein supporting the cash consideration SDG&E is receiving as part of the proposed transaction.” (SDG&E Comments, p. 4.) The draft decision did in fact carefully consider the evidence presented by SDG&E and Whispering Hills. SDG&E more accurately describes its problem with the draft decision later in its comments, where it argues that the allegations presented by the local residents: “[H]ave very little substance and certainly should not be accorded the weight the Draft Decision provides – enough weight to overcome the evidence provided by SDG&E and the Developer supporting the purchase price.” (*Id.*, p. 7.) While SDG&E disagrees with how the draft decision weighed the conflicting evidence, that does not constitute legal error, nor does it support SDG&E’s claim that the draft decision ignored SDG&E’s evidence.

More troubling is SDG&E's attempt to discredit the local residents who participated in this proceeding. The local residents (Ms. Fox, Mr. Mathewson, and Mr. Nielsen) are not regular participants in Commission proceedings, but they followed proper Commission procedures and presented clear and cogent arguments. Nevertheless, SDG&E characterizes the draft decision's serious consideration of their claims as: "[A]llowing isolated local residents to obstruct transactions not to their liking merely by alleging, without a competing independent appraisal or other competent evidence, that a negotiated sales price is too low." (SDG&E Comments, p. 2.)

In fact, it was Mr. Mathewson who presented to the Commission the significant documentary evidence that Whispering Hills had entered into an agreement to resell 0.95 acres of the land that it will acquire from SDG&E for \$965,000. This evidence was not provided by SDG&E. Given the problems with SDG&E's application, including SDG&E's failure to serve the application on anyone other than itself and Whispering Hills, and its failure to provide relevant evidence to the Commission, SDG&E is not in a position to be impugning the character and motivations of Ms. Fox, Mr. Mathewson, and Mr. Nielsen.

In its comments on the draft decision, Whispering Hills expresses some sympathy for the arguments it expected SDG&E to make in its comments. (Whispering Hills appears to have received a preview of SDG&E's comments.) Nevertheless, Whispering Hills urges the Commission to adopt the draft decision without delay.

ORA "applauds the overall direction and thrust" of the draft decision in its comments, but requests that aspects be made more detailed. First, ORA requests that the Commission set an end date for the negotiations. This does not appear to be necessary, given the apparent alignment of interests of SDG&E and

Whispering Hills. Second, ORA recommends that SDG&E be required to provide information about the assessed value of comparable parcels of land to assist the Commission in evaluating the sale price of the property. SDG&E has the option of providing such information, but we will not require it.

Reply comments were received from SDG&E and ORA. SDG&E's reply comments criticize ORA's recommendations. While we agree with some of the points raised by SDG&E, SDG&E takes its argument too far by essentially arguing that the Commission cannot request specific documentary evidence. (SDG&E Reply Comments, pp. 2, 4.) While we choose not to request such evidence here, we are not so arbitrarily limited in our ability to build an evidentiary record as SDG&E appears to believe.

ORA's reply comments excoriate SDG&E, arguing that SDG&E's comments lack merit, particularly in "conveniently" ignoring its own data that SDG&E ratepayers would substantially benefit from a higher sale price. (ORA Reply Comments, pp. 2-4.) ORA also criticizes SDG&E's claims for the value of its own evidence, arguing that: "[F]ar from offering 'over-whelming evidence' of the value of its proposed transaction to its ratepayers, SDG&E's application offers self-serving and—at best—a minimal justification for approving the transaction." (*Id.*, p. 2.) And: "ORA is similarly unimpressed with SDG&E's valuation evidence particularly when SDG&E's own data responses proves that its ratepayers would substantially benefit from a higher sales price. The notion that the DD commits legal error simply because it does not accept the utility's position in a given case is simply wrong." (*Id.*, p. 3.)

ORA noted that while Whispering Hills' comments were "more nuanced" than those of SDG&E, they were based on self-interest, and: "[S]hould have little

bearing on the Commission's ultimate disposition of this proceeding." (ORA Reply Comments, pp. 1, 3-4.)

Other than correcting the error in Ordering Paragraph 3, no changes are made to the decision.

Findings of Fact

1. The record contains conflicting information relating to the value of the property that SDG&E proposes to sell.
2. This Commission previously approved the temporary and permanent relocation of the transmission lines at issue, in response to SDG&E Advice Letter 1566-E.
3. Allowing Whispering Hills to grade the property at issue will not adversely affect SDG&E's ability to provide safe and reliable electrical service.
4. Grading of land is a project subject to review under CEQA.
5. The City of San Juan Capistrano and the Capistrano Unified School District are the Lead Agencies for environmental review under CEQA.
6. The Commission is a Responsible Agency for environmental review under CEQA.
7. The environmental impacts of the grading at issue have been mitigated to less-than-significant levels by mitigation measures adopted by the Lead Agencies.

Conclusions of Law

1. It is not clear that the proposed \$100,000 sale price for the property is reasonable.
2. Allowing grading of the property at issue is consistent with this Commission's approval of Advice Letter 1566-E, and should be approved.

3. The Commission, in its role as a responsible agency, has reviewed the environmental documents prepared by the Lead Agencies and has complied with the requirements of CEQA.

4. We find that the Lead Agencies adopted reasonable and feasible mitigation measures for grading activities to either avoid or reduce any potentially significant environmental impacts to less-than-significant levels and we adopt those applicable grading mitigations for purposes of our approval.

INTERIM ORDER

IT IS ORDERED that:

1. San Diego Gas & Electric Company (SDG&E) is to enter into further negotiations with Whispering Hills, LLC (Whispering Hills) regarding the price to be paid for the property, as described above.

2. Upon completion of its further negotiations with Whispering Hills, SDG&E shall file and serve a motion, requesting leave to modify its application to reflect the results of the negotiations, as described above.

3. SDG&E is authorized to allow Whispering Hills to perform grading on the specified portion of SDG&E's property. No permanent non-utility structures may be constructed on the property at issue unless and until final approval of the sale application is granted.

4. The assigned Commissioner and Administrative Law Judge may issue such rulings as necessary to administrate this proceeding.

This order is effective today.

Dated April 7, 2005, at San Francisco, California.

MICHAEL R. PEEVEY

President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
Commissioners